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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE: FACEBOOK PRIVACY
LITIGATION

Case No. 10-cv-02389-JW

JOINT CASE MANAGEMENT STATEMENT

CMC Date: Monday, November 15, 2010
Time: 10:00 a.m.
Judge: Hon. James Ware

1 For the initial case management conference (“CMC”) set for November 15, 2010,
 2 plaintiffs David Gould and Mike Robertson (“Plaintiffs”) and defendant Facebook Inc.
 3 (“Defendant” and collectively with Plaintiffs, the “Parties”) hereby submit this Joint Case
 4 Management Statement pursuant to Federal Rule of Civil Procedure 26(f), Civil Local Rule 16-9,
 5 and this Court’s Order dated September 29, 2010.

6 Pursuant to Federal Rule of Civil Procedure 26(f), the Parties held a telephonic meeting of
 7 counsel on Friday, September 10, 2010. Michael J. Aschenbrener participated for plaintiff David
 8 Gould. Kassra P. Nassiri and Charles H. Jung participated for plaintiff Mike Robertson.
 9 Matthew D. Brown and James Penning participated for Defendant.

10 **I. JURISDICTION AND SERVICE**

11 The Parties agree that this Court has subject matter jurisdiction under the Class Action
 12 Fairness Act, 28 U.S.C. § 1332(d)(2). No issues exist regarding personal jurisdiction or venue
 13 and no parties remain to be served.

14 **II. STATEMENT OF CLAIMS AND DEFENSES**

15 This putative class action involves all Facebook users in the United States who clicked on
 16 a third-party advertisement displayed on Facebook between May 28, 2006 and March 21, 2010.
 17 In short, Plaintiffs claim that Defendant transmitted personal user information belonging to the
 18 class to third parties without authorization and in violation of Defendant’s agreement with its
 19 members. Plaintiffs, on behalf of the class, allege (1) breach of contract; (2) breach of implied
 20 contract; (3) breach of the implied covenant of good faith and fair dealing; (4) violation of the
 21 Electronic Communications Privacy Act of 1986; (5) violation of the Stored Communications
 22 Act; (6) unfair business practices in violation of California Business and Professions Code §
 23 17200 *et seq.*; (7) violation of California Penal Code § 502; (8) violations of California Civil
 24 Code §§ 1572, 1573; (9) negligence; (10) negligence per se; (11) unjust enrichment; and (12)
 25 violations of California Civil Code § 1750 *et seq.*

26 Defendant Facebook denies liability as to all causes of action by Plaintiffs. Facebook
 27 contends that it has not violated any agreements with its members or transmitted any information
 28 belonging to its members to third parties without authorization. Facebook further denies that this

1 action meets the requirements of class certification under Fed. R. Civ. P. 23 (“Rule 23”).

2 **III. LEGAL ISSUES**

3 The Parties anticipate that disputed legal issues will concern each of the causes of action
4 asserted by Plaintiffs, as well as whether this case may be certified as a class action under Fed. R.
5 Civ. P. 23.

6 **IV. MOTIONS**

7 **The following motions have been previously filed in this action:** On July 21, 2010,
8 Plaintiff Mike Robertson filed an Administrative Motion to Consider Whether Cases Should be
9 Related, seeking to relate *Robertson v. Facebook, Inc.*, No. 10-cv-02306-JF and *Gould v.*
10 *Facebook, Inc.*, No. 10-cv-02389-JW. The motion was granted on July 26, 2010. On November
11 4, 2010, Defendant Facebook filed an Administrative Motion to Extend Deadline to Respond to
12 Plaintiffs’ Consolidated Class Action Complaint. The motion was granted on November 5, 2010.

13 **Possible future motions include the following:** Motion(s) to Dismiss; Motion to Certify
14 Class; Motions for Summary Judgment; discovery motions as necessary, and pre-trial motions.
15 The Parties reserve the right to file other motions.

16 **V. AMENDMENT OF PLEADINGS**

17 Per Court Order (Dkt. 35), Plaintiffs filed a Consolidated Complaint on October 11, 2010
18 (Dkt. 36). Defendant’s response is due December 10, 2010.

19 The Parties propose that a deadline for the amendment of pleadings should be set for a
20 reasonable period prior to the conclusion of merits discovery. Since the Parties are including
21 herein a proposed schedule through the end of class certification proceedings, the Parties propose
22 that a specific deadline be included in a later proposed case management schedule to be submitted
23 after a decision on class certification.

24 **VI. EVIDENCE PRESERVATION**

25 The Parties are aware of their obligation to preserve relevant evidence, including
26 electronically stored information, and have taken steps to comply with their obligations.

27 Plaintiffs sent a letter to Defendant dated August 24, 2010, which set forth the categories
28 of evidence that, at a minimum, Plaintiffs contend should be preserved. During the Rule 26

1 conference, Plaintiffs' counsel inquired about what steps Defendant has taken to preserve
2 potentially relevant information. Defendant's counsel stated that they had received Plaintiffs'
3 evidence preservation correspondence and that, although not agreeing with the scope of the
4 obligations set forth in the letter, they have taken steps to comply with their obligations, including
5 putting a litigation hold in place. The Parties have agreed to continue to meet and confer on
6 evidence preservation issues with an eye towards meeting their respective obligations to preserve
7 potentially relevant information.

8 **VII. DISCLOSURES**

9 The Parties had previously agreed that initial disclosures would be made three weeks
10 following Defendant's response to Plaintiffs' consolidated amended complaint. However, in light
11 of the Court's November 5, 2010 Order extending Facebook's time to respond to the
12 Consolidated Complaint, Plaintiffs believe that initial disclosures should be made no later than
13 December 3, 2010. Defendant maintains that initial disclosures should be due three weeks
14 following Defendant's response to Plaintiffs' consolidated amended complaint.

15 **VIII. DISCOVERY**

16 Plaintiffs have propounded written discovery, including interrogatories and document
17 requests.

18 **A. Bifurcation of Discovery**

19 The Parties agree that discovery should be bifurcated, with discovery on matters not
20 bearing on class certification issues to be conducted only after the Court issues a decision on class
21 certification. Phased discovery of this sort (precertification discovery first, followed later by
22 merits discovery) is contemplated by the MANUAL FOR COMPLEX LITIGATION (*see, e.g.*, §§ 21.11,
23 21.14), which states that allowing full merits discovery before a decision on certification "can
24 create unnecessary and extraordinary expense and burden" (*id.* § 21.14). The Parties recognize
25 that the line between merits and class discovery is not always easy to delineate and agree to meet
26 and confer in good faith on disagreements to determine appropriate limits to class discovery.
27
28

B. Scope of Discovery

1. Plaintiffs' Statement

Plaintiffs anticipate both written and oral discovery on both the merits of the case and on issues concerning class certification. Plaintiffs identify the following categories of discovery listed below. Plaintiffs reserve the right to add to or otherwise modify these categories as additional facts and legal issues become known to Plaintiffs in preparing for trial.

- The identities of putative class members;
- Defendant's current and past terms and conditions with its members, and any press releases or communications concerning those terms and conditions as they may relate to third-party advertising;
- Defendant's receipt, interception, records, and electronic storage of all member information, communications and activities;
- Defendant's relationship with its advertisers, including, but not limited to, contracts, transactions, payments, and data transmission between Defendant and its advertisers or advertiser-intermediaries, and any press releases or communications related thereto;
- All tracking and accounting data related to advertiser impressions, views, clicks and transactions;
- All authorizations related to Defendant's disclosure of member information to any third party; and
- Defendant's knowledge, investigations, reports, analyses, policies, deliberations and efforts (including, but not limited to, remedial efforts) concerning the transmission or non-transmission of Facebook member information to advertisers or advertiser-intermediaries.

The Parties have conferred concerning the disclosure of electronically-stored information. The Parties have not reached agreement on the appropriate format for production of electronically stored information. The Parties have agreed to confer further, with the assistance of technical consultants as appropriate, to attempt to reach a mutually satisfactory agreement on the appropriate format for production of electronically stored information that is responsive to particular discovery requests.

2. Defendant's Statement

Presently, Defendant anticipates that it will seek discovery on subjects including but not limited to the following: class certification-related issues; Plaintiffs' alleged damages; Plaintiffs' knowledge of the operation of the Facebook website; and Plaintiffs' use of the Facebook website.

1 **C. Changes to the F.R.C.P. and Local Rule Limits on Discovery**

2 **1. Timing of Discovery**

3 The Parties previously conferred regarding the timing of discovery and agreed that
4 responses to discovery propounded by either Party would not be due until a reasonable time after
5 the Court determined the legal sufficiency of Plaintiffs' claims (*i.e.*, until after any motions to
6 dismiss are decided). However, in light of the Court's November 5, 2010 Order extending
7 Facebook's time to respond to the consolidated amended complaint and other developments
8 described in section X, Plaintiffs maintain that discovery should commence immediately.
9 Defendant maintains that discovery responses should not be due until a reasonable time after the
10 Court determines the legal sufficiency of Plaintiffs' claims. The Parties have agreed to continue
11 to meet and confer on these issues.

12 **2. Modification to Discovery Rules**

13 **a. Plaintiffs' Statement**

14 Plaintiffs propose ten depositions per side in each phase of the discovery (*i.e.*, ten
15 depositions per side related to class certification issues, and ten additional depositions per side for
16 full merits discovery). Given the complexity of the case, Plaintiffs request at this time that the
17 Court extend the limit during each phase of discovery to two sets of Rule 30(b)(6) topics.

18 Given the complexity of the case, Plaintiffs will likely require more than twenty-five
19 interrogatories to prove their case. The facts at issue, which are largely in Defendant's control, are
20 technically complex and likely involve millions of putative class members. Interrogatories
21 regarding Defendant's data and systems infrastructures, and Defendant's transmission of millions
22 of user's information to third parties, will involve detailed and voluminous data. Relying
23 primarily on other discovery devices, such as depositions, to obtain this information would be
24 inefficient for all Parties. Plaintiffs request at this time that they be allowed to propound up to
25 twenty-five (25) additional interrogatories.

26 Plaintiffs reserve the right to seek further modification of the limitations on discovery
27 imposed by the Federal Rules of Civil Procedure or by local rule other than as provided in this
28 report.

b. Defendant's Statement

Defendants do not currently see a need for a modification to the discovery limits set forth in the Federal Rules of Civil Procedure but reserve the right to move for additional depositions or interrogatories if they believe the need arises.

D. Proposed Discovery Plan

See section XVII ("Scheduling") below.

IX. CLASS ACTIONS

A. Plaintiffs' Statement

Plaintiffs contend that the instant case is maintainable as a class action and plan to move for class certification pursuant to Fed. R. Civ. P. 23. Please see section XVII ("Scheduling") below for a proposal on the timing.

B. Defendant's Statement

Defendant denies that a class should be certified in this action and will oppose any motion for class certification.

X. RELATED CASES

The two instant cases, *Gould* and *Robertson*, have now been consolidated and bear the caption "*In re: Facebook Privacy Litigation*."

As Defendant previously notified the Court, a related action was filed in the District of Rhode Island, captioned *Marfeo v. Facebook, Inc.*, Case No. 10-cv-00262-S-LDA (D.R.I. filed June 17, 2010). In *Marfeo*, the parties filed a stipulation to transfer the action, and on November 1, 2010, the Court entered an order transferring *Marfeo* from the District of Rhode Island to this Court.

Additionally, following the filing of Plaintiffs' Consolidated Complaint, seven additional cases were filed in the Northern District of California that contain allegations against Facebook, Zynga Game Network Inc. ("Zynga"), or some combination thereof, that pertain to the instant suit. Specifically, these cases are:

- *Graf v. Zynga Game Network, Inc.*, 3:10-cv-4680-WHA, (N.D. Cal.) (filed Oct. 18, 2010);

- *Albini v. Zynga Game Network, Inc. and Facebook, Inc.*, 3:10-cv-4723-JL (N.D. Cal.) (filed Oct. 19, 2010);
- *Gudac v. Zynga Game Network Inc.*, 3:10-cv-4793-EMC (N.D.Cal.) (filed Oct. 22, 2010);
- *Schreiber v. Zynga Game Network, Inc.*, 3:10-cv-4794-RS (N.D. Cal.) (filed Oct. 22, 2010);
- *Swanson v. Zynga Game Network, Inc.*, 5:10-cv-4092-HRL (N.D. Cal. (filed Oct. 28, 2010);
- *Carmel-Jessup v. Facebook, Inc. and Zynga Game Network, Inc.*, 3:10-cv-4930-MEJ (N.D. Cal.) (filed Oct. 29, 2010); and,
- *Phee v. Facebook, Inc. and Zynga Game Network, Inc.*, 3:10-cv-4935-SC (N.D. Cal.) (filed November 1, 2010).

Facebook believes that these seven cases should be related to the instant matter. On November 5, 2010, Zynga filed a motion to relate the cases. Plaintiffs do not oppose relating the cases. Facebook may also seek consolidation of these seven cases with the instant cases. Plaintiffs maintain that the cases should not be consolidated and would oppose any such consolidation request.

XI. RELIEF

A. Plaintiffs' Statement

Plaintiffs seek:

- An order certifying the class, directing that this case proceed as a class action, and appointing Plaintiffs and their counsel to represent Plaintiffs and the class;
- An order declaring that the actions of Facebook constitute violations of each cause of action alleged;
- An order entering judgment for all statutory and punitive damages authorized by law;
- An order awarding restitution for all for all money to which Plaintiff and the Class are entitled in equity;
- An order awarding Plaintiffs and the Class their reasonable litigation expenses and attorneys' fees;
- An order awarding Plaintiffs and the Class all pre- and post-judgment interest, to

the extent allowable;

- An order entering injunctive relief and/or declaratory relief as necessary to protect the interests of Plaintiffs and the Class; and,
- An order awarding such other relief as equity and the law may require.

B. Defendant's Statement

Defendant does not currently anticipate any counterclaims but reserves the right to add such counterclaims in the event that facts arise to support them.

XII. SETTLEMENT AND ADR

Pursuant to ADR Local Rule 3-5(b), Plaintiffs and Defendant filed ADR Certifications by Parties and Counsel on September 17, 2010. The Parties participated in an ADR Phone Conference on September 29, 2010.

Defendant is amenable to non-judicial private mediation, with such mediation to be held within 45 days of a decision on a class certification motion. Plaintiffs are amenable to non-judicial private mediation but would like mediation to take place before a decision on class certification.

XIII. CONSENT TO MAGISTRATE JUDGE FOR ALL PURPOSES

The Parties do not consent to proceed before a Magistrate Judge for all purposes.

XIV. OTHER REFERENCES

The Parties do not believe, at this time, that this case is suitable for reference to binding arbitration, a special master, or the Judicial Panel on Multidistrict Litigation.

XV. NARROWING OF ISSUES

At this stage in the proceedings, the Parties are unaware of any issues that can be narrowed by agreement or motion, other than the anticipated motions set forth above.

XVI. EXPEDITED SCHEDULE

The Parties agree that the case is not appropriate for expedited or streamlined procedures.

XVII. SCHEDULING

The following is the Parties' proposed schedule for class certification discovery, briefing, and hearing.

Event	Proposed Deadline
Completion of Class Certification Fact Discovery	Six months from close of pleadings (<i>i.e.</i> , after any motions to dismiss have been decided and, if necessary, Defendant has filed an Answer).
Completion of Class Certification Expert Discovery (if Any)	Two months after completion of class certification fact discovery. During this period, the following will occur on a schedule to be worked out by the parties: disclosure of experts, service of initial expert reports, rebuttal reports, and depositions.
Deadline to File Any Motion for or to Deny Class Certification	If class certification expert discovery takes place, then forty-five days after completion of class certification expert discovery. If there is no expert discovery, then forty-five days after the completion of class certification fact discovery after the Parties have confirmed that there will be no expert discovery, whichever is later.
Deadline to File Any Opposition to Motion for Class Certification	Forty-five days after motion for or to deny class certification.
Deadline to file Any Reply on Motion for Class Certification	Twenty-one days after filing of opposition to motion for class certification.
Class Certification Hearing	At the Court's convenience

XVIII. TRIAL

The Parties anticipate that trial is likely to last approximately 10 court days.

XIX. DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR PERSONS

Pursuant to Federal Rule of Civil Procedure 7.1 and Civil Local Rule 3-16, Plaintiffs state:
No persons, firms, partnerships, corporations (including parent corporations) or other entities known have any: (i) a financial interest in the subject matter in controversy; or (ii) any other kind of interest that could be substantially affected by the outcome of the proceeding.

On September 24, 2010, Facebook filed its Certification of Interested Entities as required by Civil Local Rule 3-16. Pursuant to Federal Rule of Civil Procedure 7.1 and Civil Local Rule 3-16, Defendant states that its prior certification remains accurate, and that as of this date, other than the named parties, there is no such interest to report.

XX. OTHER MATTERS

There are no other matters that need to be addressed at this time.

Respectfully Submitted,

Dated: November 5, 2010

COOLEY LLP

/s/ James M. Penning

James M. Penning (229727)
Attorneys for Defendant FACEBOOK INC.

Dated: November 5, 2010

EDELSON MCGUIRE LLC

/s/ Michael J. Aschenbrener

Michael J. Aschenbrener (pro hac vice)
Attorneys for Plaintiffs

Dated: November 5, 2010

NASSIRI & JUNG LLP

/s/ Kassra P. Nassiri

Kassra P. Nassiri
Attorneys for Plaintiffs

ATTESTATION PURSUANT TO GENERAL ORDER 45

I, James M. Penning, attest that concurrence in the filing of this Joint Case Management Statement has been obtained from each of the other signatories.

/s/ James M. Penning
James M. Penning

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